

# **THE DEMISE OF ULTRA VIRES - A REPLY TO CHRISTOPHER FORSYTH AND LINDA WHITTLE**

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## **I. INTRODUCTION**

Dr Christopher Forsyth must be congratulated for his unshakeable resolve and indefatigable energy in holding the line on ultra vires. He has stoically resisted the onslaught of academic, judicial and extra-judicial writings on the common law foundations of judicial review. With fortitude, he has defended the conceptual linkage of ultra vires and shunned argument about judicial power being deeply embedded in the common law. Again, in the pages of this review, Dr Forsyth joins with Linda Whittle in defence of the ultra vires doctrine - as establishing the one true constitutional justification of judicial review.<sup>1</sup> He reaffirms what he and his followers dub the 'modified doctrine of ultra vires'.

This reply identifies the strained logic of the (so-called) modified doctrine and refutes the forced reconciliation it attempts. The title of this reply refers to the writer's article, 'The Demise of Ultra Vires - Judicial Review in the New Zealand Courts' (hereafter 'The Demise of Ultra Vires').<sup>2</sup> That article recorded the debate over ultra vires in the United Kingdom and observed the emergence of a methodology of judicial review (termed 'constitutional review')<sup>3</sup> that demonstrates the potency of the courts' inherent jurisdiction at common law. This reply summarises the modified doctrine of ultra vires and addresses the writers' specific arguments of refutation against (as they quaintly put it) 'a voice from New Zealand'. Their article is a revised version of a presentation Dr Forsyth gave to the Public Law class at the University of Canterbury in September 2001, in which he repeatedly directed a question at the judges: 'Who *are you* [the judge] to interfere in the exercise of a discretion entrusted to a democratically accountable decision-maker by a democratically elected Parliament?'<sup>4</sup> I am happy to oblige Dr Forsyth, although I question whether these or any other words are capable of shaking his resolve.

To presage what follows: the ultra vires doctrine is ahistorical in its claim to clothe the courts with constitutional justification, is artificial in its linkage to presumed parliamentary intent, is misty-eyed in its deference to popular democracy, and is perverse in reserving to the courts a servile, mechanistic role. The opening pages of this reply rehearse some of the arguments already

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1 C Forsyth and L Whittle, 'Judicial Creativity and Judicial Legitimacy in Administrative Law' (2002) 8 *Canta Law Review* 453.

2 PA Joseph, 'The Demise of Ultra Vires' [2001] *Public Law* 354.

3 PA Joseph, 'Constitutional Review Now' [1998] *New Zealand Law Review* 185; Joseph, 'The Demise of Ultra Vires', *ibid* 373-5; P A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 778-87. Professor Jeffrey Jowell QC is the leading exponent of constitutional review in the United Kingdom. See his 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *Public Law* 669.

4 Forsyth and Whittle, above n 1, 453 restate the question in the first paragraph of the introduction to their article.

canvassed in the debate. The article to which Forsyth and Whittle refer ('The Demise of Ultra Vires') contains a fuller account of the contortions of ultra vires scholarship.<sup>5</sup> The ensuing pages of this article probe the relationship of the political and judicial branches and take the debate into new territory concerning statutes and common law method.

## II. COMMON LAW FOUNDATIONS OF JUDICIAL REVIEW

The administrative lawyer, Stanley de Smith, observed that 'judicial review in England has significant roots in history'.<sup>6</sup> The following identifies the common law origins of judicial review from the 13th century, when the superior courts split off from the King's Council and developed their inherent jurisdiction. The shortcomings of positivist methodology forced Forsyth and Whittle to contest this ancient jurisdiction.

Forsyth and Whittle embarked upon a misplaced search for the *legal* source of the courts' powers. They asked: 'Where was the *legal rule or rules* that gave the power to the judges to intervene?'<sup>7</sup> In truth, there was no legal rule or rules but only the accommodation of the common law. They observed the expansion of the courts' powers over the past 50 years and asked: 'Where was the constitutional justification for this extension of judicial review?'<sup>8</sup> The answer, of course, was where it had always been - embedded in common law method. Forsyth and Whittle contested this and drew their linkage to ultra vires. Immediately, they encountered a problem. The historical record of the superior courts long predated ultra vires scholarship:

The ultra vires model represents a uniquely modern view of judicial review. For a doctrine whose pre-eminent purpose is to legitimise judicial review, it is profoundly ahistorical. De Smith observed that the basic principles that secured the courts' jurisdiction were established by the end of the seventeenth century and noted that the techniques by which these principles were implemented "have survived into the modern age".<sup>9</sup>

The ultra vires doctrine was adapted from mid-19th century public utilities law.<sup>10</sup> The expression 'ultra vires' was used to describe independent statutory corporations that had exceeded their specific statutory powers.<sup>11</sup> This presented a dilemma. If ultra vires scholarship reached back only 150 years, how might it account for the prerogative writs that had been in use by the courts for several centuries? Forsyth and Whittle were driven to the historically indefensible proposition that the 'idea of an age old common law right to judicial review may be doubted'.<sup>12</sup> One is mystified as to their explanation. They cited a dictum of Holt CJ in a decision reported in 1700, as a coup de grâce to end all argument. In *R v Glamorganshire Inhabitants*,<sup>13</sup> Holt CJ stated:

5 Joseph, 'The Demise of Ultra Vires', above n 2. See also P Craig, 'Ultra Vires and the Foundations of Judicial Review' [1998] *Cambridge Law Journal* 63; P Craig, 'Public Law, Political Theory and Legal Theory' [2000] *Public Law* 211. The full list of citations on the foundations of judicial review is given in the writer's article above n 2, 356.

6 S A de Smith, *Judicial Review of Administrative Action* (3rd ed, 1973) 25.

7 Forsyth and Whittle, above n 1, 453.

8 Ibid.

9 Joseph, 'The Demise of Ultra Vires', above n 2, 367.

10 Ibid 366 (citing de Smith, above n 6, 83).

11 See *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473 (HL).

12 Forsyth and Whittle, above n 1, 459.

13 (1700) 1 Ld Raym 580; 91 ER 1287, 1288.

[T]his Court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to encroach jurisdiction to themselves greater than the Act warrants, this court will send a certiorari to them.

This dictum established nothing but that which the words stated: the court will intervene to correct an excess of power. The question for the King's Bench was whether a statutory power to raise money to repair a bridge authorised the raising of money to repair weirs that supported the bridge. Holt CJ issued his *ex cathedra* to denounce the objection to the court's jurisdiction. It had been objected that, 'because it was a new jurisdiction erected by a new Act of Parliament, the trust of the execution of which is reposed in the justices ... this Court has nothing to intermeddle with it'.<sup>14</sup> That objection raised Holt CJ's ire because it challenged what the King's Bench had been doing for over 300 years: namely, intervening to ensure that justices and inferior courts and tribunals complied with the law that set the limits of their jurisdiction and powers. Holt CJ's dictum did not transform the court's inherent (common law) powers of review into parliamentary or statutory emanations. The courts before and after the *Glamorganshire* case affirmed their common law powers of review independently of the co-ordinate role and power of Parliament.<sup>15</sup>

The common law is the foundation of judicial review in two senses: first, the principles of good administration that comprise our administrative jurisprudence are developed by the courts in exercise of their inherent jurisdiction at common law, and secondly, the courts' jurisdiction to develop these principles is itself based in and part of the common law. The power of the superior courts is inherent, not prescribed. Unlimited jurisdiction is an innate feature of a superior court and is self-referential of its very existence.<sup>16</sup> The only limits on inherent jurisdiction are those that the superior courts choose to recognise. In *R v Bedwellty Justices, Exp Williams*<sup>17</sup> Lord Cooke of Thorndon reflected that a 'superior court of general jurisdiction, such as the High Court of Justice, has jurisdiction to determine... the limits of its own jurisdiction'. Nowhere did the law positively empower the original courts (the Court of Common Pleas, the Court of Exchequer, or the Court of King's Bench) to adjudicate disputes and develop the law. The Court of King's Bench originally sat in the presence of the King and claimed jurisdiction to correct the proceedings of other courts (including those of the Common Pleas), and to control justices and officials if they acted irregularly or without jurisdiction. From the 13th century onwards, the King's Bench crafted its administrative jurisprudence around the great prerogative writs of habeas corpus, quo warranto, prohibition, certiorari and mandamus.<sup>18</sup> The prerogative writs, and the principles that

14 Ibid 580; 1287.

15 See, eg, *Bagg's Case* (1615) 11 Co Rep 93b; *R v Barker* (1762) 3 Burr 1265.

16 See the excellent discussion in *HKSAR v Siu Yat Leung* [2002] 2HKC 175, 179-180 per Deputy Judge McCoy SC ('[t]he very right to grant bail is innate in a superior court of unlimited jurisdiction').

17 [1997] AC 225, 232. Hence the general common law principle that no court of co-ordinate jurisdiction may sit in review of itself. See *Re Kray* [1965] Ch 736, 745, followed in *HKSAR v Siu Yat Leung* [2002] 2HKC 178.

18 The writs were not, in truth, 'prerogative' at all since they were available to subjects as well as the Crown from earliest times. However, the historic identification of the writs with the King's Bench ascribed to them the character of *prerogative*, so that it remains acceptable to continue to refer to the prerogative orders as a particular group of remedies. See Joseph, *Constitutional and Administrative Law in New Zealand*, above n 3, 940-2. For development of the judicial review jurisdiction at common law, see Joseph, 'The Demise of Ultra Vires', above n 2, 363-4 and 367-8.

secured the court's jurisdiction, were firmly established by the end of the 17th century, long before the broadening of the franchise and the growth of democracy.<sup>19</sup> This historical lineage, reaching back to the origins of the common law courts, betrays attempts to elevate *ultra vires* into a conceptual framework for judicial review.

### III. PRESUMED PARLIAMENTARY INTENT

For *ultra vires* protagonists, all roads lead to Parliament and *notional* or *presumed* parliamentary intent. For them, the courts discharge a subordinate role under Parliament's patronage. They exist primarily to uphold Parliament's legislation and to police its delegations to the executive. Protagonists discount any historical *constitutional* role, such as upholding the rule of law, securing the constitutional balance, or standing between the individual and the State. Yet, these functions are the constitutional birthright of the superior courts. The judiciary is indubitably a part of *government* (alongside the executive and Parliament) and is invested with authority to develop the law. The courts expound upon not only the common law but also statute law through the ascription of meaning to statutes in actual cases.<sup>20</sup> At one time, the common law claimed to control the exercise of all public power - prerogative *and* parliamentary. The King's Bench extolled elementary notions of reason and fairness for checking parliamentary power and asserted the right to adjudge the validity of Parliament's statutes: 'for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void'.<sup>21</sup> The constitutional struggles of the 17th century eventually confirmed Parliament's power and quieted judicial assertions that the common law controlled legislation. Following the Glorious Revolution, the judges conceded the superiority of statute law over the common law and returned their attention to checking executive interference or abuse. The King's Bench had no reason to express gratitude to Parliament when it crafted its administrative jurisprudence. The judges' constitutional standing was independent of Parliament and the King, although it was not until 1700 that the judges enjoyed protection against arbitrary removal from office.<sup>22</sup> From medieval times, judicial power existed to resolve disputes according to law and 'to correct ... any manner of misgovernment'.<sup>23</sup> The King's Bench developed the prerogative writs to facilitate the court's supervision over matters of administration. For Lord Mansfield, the writ of mandamus was intended to supplement and develop the law, 'upon all occasions where the law has established no specific remedy, and where injustice and good government there ought to be one'.<sup>24</sup> Parliament and the courts exercised co-ordinate, constitutive authority - Parliament through legislation, the courts through principles of common law. Judicial power evolved in tandem with legislative power but it was never dependent on it: 'It was only in the age

19 De Smith, above n 6, 25.

20 See commentary below.

21 *Dr Bonham's Case* (1610) 8 Co Rep 113b, 118a per Coke CJ. See TFT Plucknett, 'Bonham's Case and Judicial Review' (1926) 40 *Harvard Law Review* 30, 35-45 for a review of the cases from the reign of Edward II that Sir Edward Coke relied on.

22 See the *Act of Settlement* (1700) 12 & 13 Will III, c 2.

23 *Bagg's Case* (1615) 11 Co Rep 93b, 98a. See P Craig, 'Public Law, Political Theory and Legal Theory' [2000] *Public Law* 211, 231-2.

24 *R v Barker* (1762) 3 Burr 1265, 1267.

of popular democracy that lawyers seized on the fiction of presumed legislative intention as the foundation of judicial review'.<sup>25</sup> The coupling of judicial review and presumed parliamentary intention occurred from the mid-19th century, when universal suffrage led to the expansion of government and broad delegations to the executive. The ultra vires doctrine threatened to obscure - and for a short while did obscure - the historical foundations of judicial review. With a return to the courts' common law foundations, the repudiation of the doctrine leaves no vacuum to fill.

#### IV. MODIFIED DOCTRINE OF ULTRA VIRES

Forsyth and Whittle believe that a modified ultra vires doctrine remedies the shortcomings of the traditional doctrine. But their modified doctrine is game-playing. It draws not on *actual*, but on *deemed or presumed* parliamentary intent. It is game-playing to deem or presume something to be that which it is not. In 'Heat and Light: A Plea for Reconciliation', Forsyth postulated that his modified doctrine had silenced the critics of ultra vires review.<sup>26</sup> The critics, he ventured, held to the view that:

Unless Parliament clearly intends otherwise, the common law will require decision-makers to apply the principles of good administration as developed by the Judges in making their decisions.<sup>27</sup>

By comparison, proponents of the modified doctrine held to the view that:

Unless Parliament clearly indicates otherwise, *it is presumed to intend* that decision-makers must apply the principles of good administration drawn from the common law as developed by the Judges in making their decisions.<sup>28</sup>

This 'reconciliation' acknowledges two things: first, that the principles of good administration the courts apply are judicially developed at common law, and secondly, that Parliament (had it given any thought at all to the matter) *is presumed to intend* the application of these principles. Forsyth and Whittle claimed that it was neither 'unreasonable' nor 'implausible' to impute such an intention to Parliament.<sup>29</sup> In reality, ultra vires protagonists accept that Parliament does not give a moment's thought to these matters. In his earlier writings, Forsyth was disarmingly candid. He acknowledged 'what is plainly an artificial construct: the intention of Parliament'.<sup>30</sup> In their section headed 'Artificiality - real or apparent?', Forsyth and Whittle concede the artificiality of their doctrine where legislation is ambiguous or where conditions are judicially implied into a statute.<sup>31</sup> But they are unrepentant; they nevertheless ask that the courts uphold the *intention of Parliament*. We are asked to forgive the fiction and beggar belief. The need to 'modify' the ultra vires doctrine was a concession that it lacks explanatory power. The modified doctrine is game-playing that even its proponents concede is not worth the 'heat and light' it generates.<sup>32</sup> The

25 Joseph, 'The Demise of Ultra Vires', above n 2, 364.

26 C Forsyth, 'Heat and Light: A Plea for Reconciliation' in C Forsyth (ed), *Judicial Review and the Constitution* (2000).

27 Ibid 396.

28 Ibid (emphasis added).

29 Forsyth and Whittle, above n 1, 456 quoting from 'Heat and Light: A Plea for Reconciliation', above n 26, 397.

30 Forsyth, 'Heat and Light: A Plea for Reconciliation', above n 26, 396.

31 Forsyth and Whittle, above n 1, 456.

32 Forsyth, 'Heat and Light: A Plea for Reconciliation', above n 26, 396.

traditional doctrine holds that, when the courts intervene to correct defective decision-making, they are simply policing the limits of Parliament's delegation. This explanation produces instant constitutional justification for judicial review. When the courts intervene in this way, they are vicariously drawing upon the authority of the people as expressed through Parliament. The modified doctrine continues to draw this linkage, as the justification for judicial review. Forsyth and Whittle punctuated their article with references to the *unelected* judges and the *elected* representatives of the people in Parliament. Their thesis reduces to a superficial appeal to representative democracy and presumed parliamentary intent. Their uncomplicated depiction of the judicial role defies realities when the courts uphold the requirements of good administration. *Anisminic* established a legal landmark that relegated the language of ultra vires. This decision extended the scope of judicial review to cover any material error of law made in the course of applying a statutory power.<sup>33</sup> Decisions that were *intra vires* were reviewable if the decision-maker had failed to comply with the requirements of fairness, had had regard to irrelevant considerations or had failed to have regard to relevant ones, had failed properly to promote the statutory purposes, or had failed to comply with the requirements of fairness. In the wake of *Anisminic*, it made no sense to perpetuate the language of ultra vires.

The extension of judicial review to non-statutory bodies ended all pretensions to pure ultra vires doctrine.<sup>34</sup> Forsyth and Whittle acknowledged as much but sought to consign this development to a legal byway. 'For present purposes', they wrote, 'it is enough to remark that there is a common law principle that prevents the abuse of monopoly power and that is the justification for judicial intervention in non-statutory cases'.<sup>35</sup> They would indulge in Procrustean scholarship - find a convenient legal categorisation and force conformity with it. They cited Forsyth's earlier writings where he had attempted to accommodate judicial review of non-statutory bodies as a special application of Sir Matthew Hale's principle of a business affected with a public interest.<sup>36</sup> Hale's ancient common law principle is inapposite as non-statutory bodies may be judicially reviewable, whether or not they exercise monopoly power as required under Hale's principle. Contrary to what Forsyth and Whittle suggest, the courts have applied ordinary principles of justiciability to non-statutory bodies. Any decision of a public nature (statutory or otherwise) is potentially reviewable. In *R v Panel on Take-overs and Mergers; Ex p Datafin plc*,<sup>37</sup> the English Court of Appeal held that decisions of the Take-overs Panel were reviewable, although the panel exercised de facto powers under a self-assumed, regulatory jurisdiction. For Lord Steyn, the 'decisive factor' in that case was not the source of the panel's power but the nature of the functions it exercised.<sup>38</sup> He said of *Datafin*: 'The Court of Appeal regarded the

33 Joseph, *Constitutional and Administrative Law in New Zealand*, above n 3, 761-3.

34 See *R v Criminal Injuries Compensation Board, Ex p Lain* [1967] 2 QB 864 (DC); *R v Panel on Take-overs and Mergers; Ex p Datafin plc* [1987] 1 QB 815 (CA); *R v Panel on Take-overs and Mergers; Ex p Guinness plc* [1990] 1 QB 146 (CA); *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).

35 Forsyth and Whittle, above n 1, 453 (n 3).

36 See my discussion and citations in 'The Demise of Ultra Vires', above n 2, 366-7.

37 [1987] 1 QB 815

38 Lord Steyn, 'Democracy Through Law' (2002 Robin Cooke Lecture, Victoria University of Wellington, 18 September 2002), 15.

common law as the true foundation of this branch of public law'.<sup>39</sup> The New Zealand courts have likewise dismissed the source of power as a determining criterion. The exercise of power is reviewable if it is 'in substance public' or has 'important public consequences'.<sup>40</sup> The courts have held that non-statutory counterparts to the Take-overs Panel in New Zealand are reviewable, although they exercise de facto rather than legally prescribed powers.<sup>41</sup>

The modified doctrine of ultra vires pursues an unobtainable goal: to explain away deficiencies in a doctrine that is pedagogically flawed. It seeks the pretence of 'fig leaves and fairy tales' - the fixation of ultra vires protagonists.<sup>42</sup> Lawyers are sufficiently robust and mature to do away with polite fictions. The independent power and functioning of the courts is deeply, historically rooted, and is vital to the prescriptive ideal of the rule of law. Without an independent system of courts, representative democracy could not vouchsafe the principles of liberty, justice and equality before the law.

## V. REPRESENTATIVE DEMOCRACY

Proponents of the ultra vires doctrine appeal to the symbolism of representative democracy, as an instant justification for the courts' powers of judicial review. The courts quash decisions that Parliament *notionally* has not authorised the decision-maker to make: 'By enforcing the boundaries of Parliament's delegation, the courts tapped the "will of the people" as expressed through Parliament'.<sup>43</sup> Unrepentant democrats denounce the *unelected* judges and deify the *elected* representatives of the people. For Forsyth and Whittle, judicial review was an exceptional remedy. It allowed an '*unelected* judiciary' to review decisions made under laws enacted 'by the *elected* representatives of the people in Parliament' (their emphasis).<sup>44</sup> Hence their question: 'Who are you [the judge] to interfere in the exercise of a discretion entrusted to a democratically accountable decision-maker by a democratically elected Parliament?'<sup>45</sup> 'How', they ask, 'consistently with the democratic nature of our constitution ... can a non-elected element of the constitution override the decision of a democratic element?'<sup>46</sup> Judicial review was an exceptional remedy because of its implications for democratic decision-making. The remedy lacked legitimacy *but for* Parliament's lifeline to representative democracy. Classical ultra vires doctrine held that, when judges quashed decisions, they were simply policing the limits of Parliament's delegation to the executive. They were, in short, upholding the democratic foundations of the constitution. When the *Anisminic* revolution scotched that simplification, Forsyth and others contrived their modified doctrine: that Parliament *was presumed to intend* the application of the common law principles of good administration. Ultra

<sup>39</sup> Ibid.

<sup>40</sup> *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 11 (Henry, Keith and McGechan JJ) (CA).

<sup>41</sup> See, eg, *Electoral Commission v Cameron* [1997] 2 NZLR 241 (CA). In 'Democracy Through Law', above n 38, 15, Lord Steyn cited this decision as the New Zealand equivalent of *Datafin*.

<sup>42</sup> See particularly C Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 *Cambridge Law Journal* 122.

<sup>43</sup> Joseph, 'The Demise of Ultra Vires', above n 2, 366.

<sup>44</sup> Forsyth and Whittle, above n 1, 454.

<sup>45</sup> Ibid 453.

<sup>46</sup> Ibid 454.

vires protagonists readily concede that the attribution of a parliamentary intention is fictional and contrived.<sup>47</sup> The fiction of presumed parliamentary intent was erected to maintain the pretence that all roads lead to Parliament. A further defect in the modified doctrine centres on the proposed justification - popular democracy. Representative democracy is paraded as a constitutional trump, a closure to all argument. But consider. What is *democracy*? Lord Hailsham explored that question and immediately identified what it is not. 'We sometimes talk', he observed, 'as if democracy were a single, easily recognized type of political community. A moment's reflection will show that this is not so'.<sup>48</sup> For him, 'democracy' was simply a statement about the 'centre of gravity where sovereignty and ultimate responsibility reside'.<sup>49</sup> Modern mass democracy engages the people as a method of choosing a government; the principle of universal suffrage (one person, one vote) empowers the people to vote for a government of their choice. Winston Churchill proclaimed the right to vote 'the foundation of all democracy'.<sup>50</sup> 'At the bottom of all the tributes paid to democracy', he reflected, 'is the little man, walking into the little booth'.<sup>51</sup> In New Zealand the right to vote is exercised every three years; in Australia, Canada and the United Kingdom the period between elections is slightly longer, at between 4-5 years. That, at core, is modern mass *democracy* - the right to vote every 3-5 years. It is not, as some ideologues suggest, a Utopian ideal or unqualified good. Churchill was quick to disabuse the notion that democracy was 'perfect' or 'all-wise'.<sup>52</sup> 'Democracy', he observed, 'is the worst form of government except all those other forms that have been tried from time to time'.<sup>53</sup> Abraham Lincoln dignified democracy with the depiction: 'Government of the people, by the people, for the people'.<sup>54</sup> Oscar Wilde was more avowedly irreligious. 'Democracy', he quipped, 'means simply the bludgeoning of the people, by the people, for the people'.<sup>55</sup> Hailsham disdained the tokenism of the word 'democracy'. 'We have no right to speak of democracy', he said, 'unless we define what we mean by it, and, even when we have done so we have no right to assume that everything democratic is good'.<sup>56</sup> Representative democracy is at base a formal concept, denoting universal suffrage. The right to vote can be of varying value, depending on whether it is exercised in a single or multi-party State, or whether it is a right of direct or indirect election. The Soviets proclaimed a right to vote that was next to worthless for those who railed against a centrally controlled State under Communist rule. This was disempowerment through democracy; the people could vote but not change the party in power. Electoral charades discount the value of democracy in many parts of the world. In 2002 the Iraqi people endorsed Saddam Hussein

47 See Forsyth 'Heat and Light: A Plea for Reconciliation', above n 26; Forsyth and Whittle, above n 1, 456.

48 Lord Hailsham, *The Dilemma of Democracy* (1978) 33.

49 Ibid 36.

50 F B Czarnomski, *The Wisdom of Winston Churchill* (1965) 99.

51 Ibid.

52 W S Churchill, 'Speech in the House of Commons, 11 November 1947', in A Jones (ed), *Chambers Dictionary of Quotations* (1996) 265.

53 Ibid.

54 Winston Churchill also idealised this form of participatory democracy: See Czarnomski, above n 50, 99.

55 O Wilde, *Sebastian Melmoth*, 'The Soul of Man under Socialism' in A Jones (ed), *Chambers Dictionary of Quotations* (1996) 1076.

56 Hailsham, above n 48, 33.



as President for a further seven years. Their endorsement was overwhelming (the authorities reported 99 per cent voter support) but it was an election without a choice. Only one name appeared on the ballot paper - Saddam's. New Zealanders have greater choice and can change their Governments at the ballot box, but only through a system of indirect election under mixed-member proportional representation (MMP). The New Zealand people diluted the value of their vote when they surrendered the right of direct election under first-past-the-post elections. Under MMP the people elect not a Government but a mix of constituency and party-list members. Post-election manoeuvrings determine the make-up of government, sometimes with surprising outcomes. After the first MMP elections in 1996, the New Zealand First Party held the balance of power and played king-maker in determining which of the two centrist parties (National or Labour) would be in government. After eight weeks of intensive negotiations, New Zealand First joined with the centre-right National Party to form a Government, to the dismay and chagrin of many.<sup>57</sup> Voters were disillusioned that proportional representation through the party-list system had removed their right to vote out a Government.

Even in Britain, where the right of direct election survives, democracy can be a hollow concept. Once the 'little man' has departed the 'little booth', representative democracy entails no other formal public participation. Between elections, the people have no formal mechanism or plebiscite by which to endorse or censure their Governments. These truths are wasted on ultra vires protagonists, who uphold democracy as a constitutional trump. Stripped of the rhetoric, their argument reduces to repetition of unstructured expressions such as 'democratic legitimacy', 'non-elected element'/'democratic element,' and the '*unelected* judiciary' and '*elected* representatives of the people in Parliament' (Forsyth's and Whittle's emphasis).<sup>58</sup> It is woeful to engage in repeated assertion. '[I]t is a pure illusion', wrote Hailsham, 'to suppose that answers will be forthcoming by the mere repetition of the word "democracy" as if it were an incantation against the evil eye'.<sup>59</sup> Majoritarian rule can be as tyrannical as any totalitarian regime, if it is not tethered to liberal ideals of tolerance, freedom and respect for human dignity.

The expressions *representative* democracy and *liberal* democracy are not synonymous. By failing to define their terms, Forsyth and Whittle confuse the two expressions. The concept of representative democracy, while essential to the legitimacy of government, lacks moral content.<sup>60</sup> It implies universal suffrage and the right to representation but says nothing about how government is to be carried on. The term 'liberal democracy' implies more. This term has substantive content, embracing a range of humanitarian values - liberty, justice, equality etc - that identifies Western political culture.

57 See the writer's commentary, 'Constitutional Law' [1997] *New Zealand Law Review* 209, 210-7.

58 See, eg, Forsyth and Whittle, above n 1, 454 and 460. The writers made repeated reference to the phrases quoted and to such phrases as 'democratically elected Parliament' and 'democratic nature' of the constitution.

59 Hailsham, above n 48, 34.

60 Compare *Dixon v Attorney-General (British Columbia)* (1989) 59 DLR (4th) 247 where McLachlin J described equal suffrage and the right to vote as 'fundamental'. See also *Prem Singh v Prasad* (Unreported, Supreme Court of Fiji, 29 August 2002) CBV0001/2002S, 22 (to be reported [2003] NZAR 1) where Dame Sian Elias described the rights to representation and free and fair elections as 'human rights'.

Representative democracy derives legitimacy from an independent judiciary that can vouchsafe these liberal democratic values. For Sir Robin Cooke, the legal system reduced to 'two complementary and legally unalterable principles: the operation of a democratic legislature and the operation of independent courts'.<sup>61</sup> The courts accept responsibility to uphold Dicey's pre-eminent meaning of the rule of law - government according to law - and to protect the citizenry from invasion or abuse.<sup>62</sup> When elections are called, political leaders treat the people and ply for their vote. And when it is all over, the people look to the courts for vindication of their rights, sometimes against encroachment by the Governments they elect. Recently, Lord Steyn identified the role of the judiciary in a modern democracy.<sup>63</sup> Judicial power did not derive legitimacy from representative democracy, but rather the reverse:

The democratic ideal involves two strands. First, the people entrust power to the Government in accordance with the principle of majority rule. Secondly, basic values of liberty and justice for all and respect for human rights and fundamental freedoms are guaranteed. For protection citizens must look to the courts. Tensions between these ideals arise from time to time. The executive and the judiciary are not on the same side. How the balance should be struck is a task that can only be entrusted to the judgment of a wholly independent and impartial judiciary. *Only such a system has democratic legitimacy.*<sup>64</sup>

Forsyth and Whittle aggrandise Lord Steyn's first strand (the principle of majority rule) but relegate his second strand (liberty, justice and respect for human rights and the rule of law). Without the twin pillars of a democratic legislature and independent courts - standing not in each other's shadow but sufficiently apart - the constitutional system would topple and crash to the ground.

## VI. CHALLENGE TO PARLIAMENTARY SOVEREIGNTY

Forsyth and Whittle discover a darker side to the common law challenge to ultra vires. The challenge unmasked is, they claim, a naked attack on the doctrine of parliamentary sovereignty. For them: 'The idea ... that ultra vires is deficient because it is artificial forms part of a wider argument that strikes at the heart of parliamentary sovereignty'.<sup>65</sup> Common law theorists, in truth, 'assert the role of the courts overthat of Parliament' amounting to a 'judicial usurpation of power'.<sup>66</sup> The writers condemn this attack as subversive of our constitutional foundations. To uphold common law requirements of fairness challenges Parliament's exclusive and inalienable power to stipulate the requisites of valid decision-making. They end their article contented that, 'through continued deference to the will of Parliament, via ultra vires, a challenge to sovereignty is averted, and constitutional orthodoxy remains intact'.<sup>67</sup>

We should ask two questions. First, why should it be subversive to challenge parliamentary sovereignty? What makes this doctrine sacrosanct and immune from challenge, when no other doctrine enjoys this immunity? Dicey

<sup>61</sup> Sir Robin Cooke, 'Fundamentals' [1988] *New Zealand Law Journal* 158, 164.

<sup>62</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1965) 202.

<sup>63</sup> Lord Steyn, 'The Case for a Supreme Court' (2002) 118 *Law Quarterly Review* 382.

<sup>64</sup> *Ibid* 388 (emphasis added).

<sup>65</sup> Forsyth and Whittle, above n 1, 459.

<sup>66</sup> *Ibid* 459 and 460.

<sup>67</sup> *Ibid* 462.

proclaimed parliamentary sovereignty the fundamental postulate of the Westminster constitution. He endorsed Alpheus Todd, whom he called a 'very judicious writer'.<sup>68</sup> Todd inveighed against any limitation on Parliament, proclaiming its 'entire freedom of action ... to legislate for the public welfare'.<sup>69</sup> These writers glorified parliamentary power and elevated its illimitability into an article of faith. But in reality, Dicey's doctrine of parliamentary sovereignty was simply a factual statement about legislative power (a statement, moreover, that can be and has been contested). The doctrine contains no intrinsic truth, principle or moral virtue. It guarantees Parliament's right to legislate but lays down no prescription as to *how* it should legislate. It is therefore perplexing why it should be subversive to challenge this conception of legislative power, when it has only factual and not normative force. The writer, for one, defends the constitutional structure but rejects the description 'parliamentary sovereignty', as representing a distortion of the parliamentary and judicial roles. It is entirely legitimate to ask: Would New Zealand or the United Kingdom benefit were either to draw upon the experience of other western States and limit its legislative powers?

The second question is more probing. Does the doctrine of parliamentary sovereignty connect with constitutional and legal realities - in particular common law method? The answer is 'no', if one takes the absolutist conception of legislative power trumpeted by Forsyth and Whittle. It is a gross misrepresentation that it is the total, *token* role of the courts to receive Parliament's words, interpret them (according to what Parliament *is presumed to* but *did not really* intend) and apply them, without critical appreciation of the constitutional, legal or social framework. On this view, Parliament hands down meaning on tablets of stone. The courts take Parliament's statutes, faithfully decipher their contents, and declare the law. This formalist depiction reserves to the courts a servile, mechanistic role, when in truth they are engaged in a collaborative, constitutive enterprise with Parliament. The term 'statutory interpretation' is a misnomer. The courts do not *interpret* legislation; they are more actively engaged in bringing meaning to the statutory text.

A statute is a *communication*. As the judiciary is the authoritative expositor of legal meaning, a statute is ultimately a communication directed at the courts. Statutory communications require both recipient (the court) and communicator (Parliament) to attach a shared meaning or significance to the enacted word. A communication involves a speaker or writer of words, and a receiver (a listener or reader). Communications are interactive and there can be no communication without a receiver; words that are never received have physical manifestation only, as sounds or signifiers on paper. In the process of communication, listeners or readers are actively engaged. Meaning is not posited through preordained, objectively *correct* interpretations. Rather, listeners or readers construct meaning around the words used. Context is crucial. In the study of linguistics, reception theory holds that meaning is brought to spoken or written words against a background of shared values, assumptions and beliefs. Stanley Fish pioneered

<sup>68</sup> Dicey, above n 62, 67.

<sup>69</sup> A Todd, *Parliamentary Government in the British Colonies* (1880) 192, quoted by Dicey, above n 62, 67-8. For discussion, see Joseph, *Constitutional and Administrative Law in New Zealand*, above n 3, 481.

the 'interpretative community' as a means of explicating legal meaning: 'Meaning, says Fish, inheres in an institutional structure within which one hears utterances as already organized with reference to certain purposes and goals (values, understandings) shared by particular interpretative communities'.<sup>70</sup> Theorists such as Fish contend that the quest to divine legal meaning in text alone (eg parliamentary enactment) is misconceived; meaning is rather 'created', not discovered. 'Interpretation', Fish wrote, 'is not the art of construing but the art of constructing'.<sup>71</sup> Constructing meaning from the statutory text draws on interpretive conventions (shared beliefs, understandings etc) and the particular contextual setting: the specific facts before the court (around which statutory meanings are constructed) and the institutional values of the legal system (which inform and/or constrain statutory meanings). In some cases the judicial ascription of statutory meaning is 'interstitial' and seemingly faithful to the statutory text; in other cases it almost entirely informs the meaning of the statutory words used. The courts have never blinched from reading 'or' as meaning 'and',<sup>72</sup> or 'may' as meaning 'must' (or vice versa),<sup>73</sup> if that is what the judicial intuition dictates. For the House of Lords, substituting 'and' for 'or' was a 'strong and exceptional interference with a legislative text' - 'surgery rather than therapeutics'.<sup>74</sup> It is intellectually facile to seek to reduce constitutive reconstruction to a function of *interpretation*. In the business of law-creation through legislation, Parliament and the courts exercise coordinate but distinct roles: Parliament through the power of initiation and enactment of legislation, the courts through the power authoritatively to assign statutory meanings to legislation in resolving disputes in actual cases.

Forsyth and Whittle assert judicial usurpation of power under the theory that judicial review is common law-based. They engage the intellectual firepower of 'fig leaves and fairy tales'.<sup>75</sup> They advocate an extreme form of legal formalism; that Parliament's legislation has a single, objectively ascertainable meaning, reserving to the courts a mechanistic (non-constitutive) role in applying legislation. This representation belies the experience of the law. Language, when used to formulate rules, is too indeterminate to dictate single, objectively 'correct' solutions when disputes arise.<sup>76</sup> The meanings the courts ascribe to statutory rules must assimilate

70 P A Joseph, 'Beyond Parliamentary Sovereignty' (1989) 18 Anglo-American Law Review 91, 113 referring to S Fish, *Is There a Text in this Class?* (1980) ch 13. See the endorsement of communication theory in *Savril Contractors Ltd v Bank of New Zealand* [2002] NZAR 699 (HC) discussed below. See also *Hamilton City Council v Fairweather* [2002] NZAR 477 (HC).

71 Fish, *ibid* 327.

72 See, eg, *R v Oakes* [1959] 2 QB 350 ('and' read as 'or'); *R v Federal Steam Navigation Co* [1974] 1 WLR 505 ('or' read as 'and').

73 See, eg, *Simpson v Attorney-General* [1955] NZLR 271 (CA & SC) ('must' read as 'may'); *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) ('may' read as 'must').

74 *R v Federal Steam Navigation Co* [1974] 1 WLR 505, 522 (per Lord Wilberforce). See J Burrows, *Statute Law in New Zealand* (2nd ed, 1999), 191-202 for examples of judicial 'manipulation' of the statutory text (albeit articulated in the conventional language of statutory interpretation).

75 The reference is to Forsyth, above n 42.

76 For criticism of formalist method see R M Unger, *Knowledge and Politics*, (1975) 92. Compare J Evans, 'Questioning the Dogmas of Realism' [2001] *New Zealand Law Review* 145, 153-5 who argues that Unger's scepticism is based on failure to distinguish problems of meaning from problems of conflict between meaning and judgment. Evans' critique accepts the problem of indeterminacy but simply transposes the problem from the exercise

conventional linguistic understandings and received common law values (or as some prefer 'principles of constitutionality').<sup>77</sup>

## VII. PRINCIPLES OF CONSTITUTIONALITY

Judicial candour is a splendid thing and sometimes judges oblige. In *Savril Contractors Ltd v Bank of New Zealand*,<sup>78</sup> Baragwanath J gave explicit recognition to communication theory. For him, Parliament and the courts are each engaged in law-creation through legislation, albeit at different stages of the process and in different 'task-related' ways (Parliament through initiating legislation, the courts through explicating and applying it).<sup>79</sup> '[T]he function of the Court on construction', observed Baragwanath J, 'is neither to usurp Parliament's unchallengeable authority to make our laws, nor to pretend to seek the will-o'-the wisp of a "parliamentary intention"'.<sup>80</sup> His Honour rejected the metaphor of a parliamentary intention, '[when] the reason for the debate on construction is the very absence of a sufficiently clear expression of parliamentary will'.<sup>81</sup> Statutory words were to be ascribed meanings that conformed to the institutional values of the legal system. These meanings depended, said Baragwanath J, 'not solely on the black letter of Parliament's language but also upon the other considerations of public policy which it is the duty of the Court to consider ... it must decide what construction will best conform with the settled precepts by which the Courts determine the meaning of statutory language'.<sup>82</sup> Ultra vires protagonists laud the will of Parliament and marginalise the judicial role, as one of subservient obedience to the statutory text (all roads lead to Parliament). Occasional judicial statements lend superficial support. A court may eschew a strained interpretation and apply (what it calls) the literal or plain meaning of an enactment, as a matter of expressed judicial obligation. Declared judicial preference for literal meanings is symptomatic of judicial under-reaching ingrained in our habits of legal thought. Literal meanings faithfully serve Parliament's (supposed) intended purpose. The courts are quick to expound upon the parliamentary intention but often, simply (one suspects), to disclaim responsibility for unfavourable judicial outcomes. In *Savril* Baragwanath J identified what lay behind the metaphor of a parliamentary intention:

Bennion employs the metaphor of a parliamentary intention, which is however no more helpful than that of a company's intention ... Bennion's references to 'Parliament's intentions' could be substituted by a reference to the judge-made precepts ... the

of *ascertaining* meaning to the exercise of *applying* meaning. He accepts the need for making exceptions or corrective extensions to statutory rules in problematic cases, although such exceptions or extensions may yield results outside the authors' judgment or contemplation. This view proposes that meaning can exist as an abstraction, removed from the entire range of communications by which meaning is conveyed. Meaning is rather *contextual*, being organised and conveyed by reference to the world around us. Evans' (so-called) problem of 'conflict between meaning and judgment' is a problem about meaning itself.

<sup>77</sup> See below, nn 91-92.

<sup>78</sup> [2002] NZAR 699 (HC).

<sup>79</sup> See also *Hamilton City Council v Fairweather* [2002] NZAR 477, 491 where Baragwanath J observed that both Parliament and the courts make law: 'Parliament by enacting our statutes, necessarily in language of some generality; the Courts ... by construing statutes - making decisions as to detail by filling in the areas that Parliament has inevitably left blank'.

<sup>80</sup> [2002] NZAR 699, 704.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid* 704-5.

Courts do not simply deduce meaning from the words Parliament uses; they also attribute meaning to such words. The Courts do this ... against a background of societal norms and values that influence the meaning of the statutory words used.<sup>83</sup>

When construing a statute, a court might legitimately uphold the 'literal' or 'plain' meaning, not because Parliament has linguistically ordained it, but because that meaning accords with the 'settled precepts' and 'considerations of public policy' that guide the court's intuition in the particular case.<sup>84</sup> However, the converse will often also apply, where the courts feel compelled to reject literal or plain meanings. Privative clauses carry a universal literal meaning. They are directions to the courts to 'keep out' but they never achieve their purpose. The courts subject privative provisions to a judicial determination that Parliament does not intend to empower conclusively decision-makers to determine questions of law, including questions that affect the limits of a decision-maker's powers. In *Peters v Davison*,<sup>85</sup> the Court of Appeal ruled that the judicial review powers of the High Court are based on the 'central constitutional role of the court to rule on questions of law'. Questions of law remain always the responsibility of the courts of general jurisdiction. It is moot whether even a 'supreme law' privative clause, prescribed by the constitution itself, will successfully oust the review jurisdiction of the superior courts. The constitutional responsibility of the courts may be at its greatest when called upon to condemn action that violates human rights or subverts the constitutional laws of the State. In *Prem Singh v Prasad*,<sup>86</sup> Dame Sian Elias (dissenting) refused to uphold a finality clause under the Fiji constitution as a constitutional trump. She emphasised the 'principle of legality, the most important attribute of the rule of law, and the context of human rights',<sup>87</sup> as grounds for holding that the finality clause did not oust the court's appellate jurisdiction in electoral matters. In *Peters v Davison*, the Court of Appeal affirmed the rule of law rationale of judicial review, that '[t]he essential purpose is to ensure that public bodies comply with the law'.<sup>88</sup>

The courts are jealous to guard against usurpation under statutory ouster or finality clauses. Despite Parliament's ostensible purpose, the courts hold that Parliament does not intend to oust their jurisdiction and deny them their constitutional role. Some courts have expressed this rule as a presumption but it is a presumption that constitutionally is incapable of displacement.<sup>89</sup> All of the (so-called) presumptions of statutory interpretation are, in truth, statements of judicial policy - the 'judge-made precepts'<sup>90</sup> or what Sir Rupert Cross<sup>91</sup> and Lord Hoffmann termed 'principles of

83 Ibid 705 (citing Joseph, *Constitutional and Administrative Law in New Zealand*, above n 3, 506-7 and Joseph, 'The Demise of Ultra Vires', above n 2, 368).

84 Ibid 704-5. Baragwanath J's terms 'settled precepts' and 'judge-made precepts' are interchangeable, so too the phrases 'considerations of public policy' and 'background of societal norms and values'.

85 [1999] 2 NZLR 164, 192.

86 (Unreported, Supreme Court of Fiji, 29 August 2002) CBV0001/2002S (to be reported [2003] NZAR 1).

87 Ibid 23.

88 [1999] 2 NZLR 164, 192.

89 See, eg, *Re Racal Communications Ltd* [1981] AC 374 (HL); *O'Reilly v Mackman* [1983] 2 AC 237 (HL); *Bulk Gas Users Group Ltd v A-G* [1983] NZLR 129 (CA); *Prem Singh v Prasad* (Unreported, Supreme Court of Fiji, 29 August 2002) CBV0001/2002S, 18-9 (Elias J dissenting). For discussion, see Joseph, *Constitutional and Administrative Law in New Zealand*, above n 3, 766-8.

90 *Savril Contractors Ltd v Bank of New Zealand* [2002] NZAR 699, 705 (Baragwanath J).

91 See J Bell and G Engle (eds), *Cross on Statutory Interpretation* (3rd ed, 1995) 166.

constitutionality'.<sup>92</sup> The courts have applied these 'presumptions' although there was no linguistic ambiguity in the statutory wording under construction.<sup>93</sup> Cross wrote that: '[T]hese presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles ...'.<sup>94</sup> These principles embrace core constitutional values that the courts will seek to uphold, even as against potentially intrusive legislation. By supplementing the enacted word, constitutional principles posit 'meaning' and provide the sub-text of statutory construction. The courts will mould Parliament's statutory language so as to preserve access to the courts, uphold the presumption of innocence, protect the liberty of the individual, give statutes prospective rather than retrospective effect, and retain intact the common law rights of citizens.<sup>95</sup>

In recent cases, English courts have elevated the judge-made precepts into a principle of legality that redefines the constitutional relationship between the branches. In *R v Secretary of State for the Home Department; Ex p Simms*,<sup>96</sup> Lord Hoffmann declared that Parliament must 'squarely confront what it is doing and accept the political cost'. 'Fundamental rights', he said, 'cannot be overridden by general or ambiguous words'.<sup>97</sup> For another judge, '[g]eneral words would not suffice'.<sup>98</sup> In *Thorburn v Sunderland City Council*,<sup>99</sup> Laws LJ reconciled developments and ruled that the doctrine of implied repeal was limited and could not apply to constitutional or human rights statutes: 'Ordinary statutes may be impliedly repealed ... [c]onstitutional statutes may not'.<sup>100</sup> Two members of the New Zealand Court of Appeal have likewise emphasised the need for emphatic words. Parliament, they said, '*must speak clearly* if it wishes to trench upon fundamental rights'.<sup>101</sup> To speak clearly, Parliament must understand the significance of its legislation and not proceed under a misapprehension, mistake or error of law. On this approach, unconscionable legislation that is enacted in error or ignorance is valid but inoperative ('disapplied'). For Elias CJ and Tipping J, this approach established a method of disapplying statutes that avoids a confrontation with Parliament. These judges would refuse to attribute to Parliament an intention to give effect to a misapprehension, mistake or error of law.<sup>102</sup>

Judges who have demanded that Parliament 'speak clearly' are in the vanguard of forging doctrine that can give balanced account of the political-judicial relationship. These judges have jettisoned the pretence of applying interpretative presumptions or aids to ascertain what Parliament may (or

92 *R v Secretary of State for the Home Department; Ex p Simms* [2000] 2 AC 115, 131.

93 Bell and Engle, above n 91, 166.

94 *Ibid.*

95 See further, Joseph, 'The Demise of Ultra Vires', above n 2, 369-70, for a raft of legal values and common law principles that recent English and New Zealand decisions have upheld.

96 [2000] 2 AC 115, 131 (HL).

97 *Ibid.*

98 *R v Lord Chancellor; Ex p Witham* [1998] QB 575, 586 (Laws J).

99 [2002] 4 All ER 156, 183-7 (QBD).

100 *Ibid.* 185.

101 *R v Pora* [2001] 2 NZLR 37, 50 (Elias CJ and Tipping J) (emphasis added).

102 For discussion, see Joseph, *Constitutional and Administrative Law in New Zealand*, above n 3, 509-12 and the writer's commentary 'Constitutional Law' [2001] *New Zealand Law Review* 449, 451-7. Compare Evans, above n 76, 166-70.

may not) have intended. When they apply the principles of constitutionality, the courts intuitively shape the meaning of legislation in actual cases. These principles are, observed Lord Hoffmann, 'little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document'.<sup>105</sup> These words give especial meaning to Lord Steyn's observation that 'Parliament does not write on a blank sheet'.<sup>104</sup> The courts recognise Parliament's right to legislate but claim their role as the expositors of legal meaning. Neither branch has legitimacy without the independent existence and functioning of the other. They are, as it were, Siamese twins, separate personalities but joined at the hip. 'Ultimately', said Lord Steyn, 'common law and statute law coalesce in one legal system'.<sup>105</sup> In his Robin Cooke Lecture, 'Democracy Through Law', Lord Steyn added a third dimension, the United Kingdom *Human Rights Act 1998*, which incorporates for United Kingdom law the European Convention rights.<sup>106</sup> The application of these rights in the municipal courts sharpens the focus on institutional values and reinforces the constitutionality of common law rights. The independent functioning of the branches is key. In *R v Lord Chancellor; Ex p Witham*,<sup>107</sup> Laws J (as he then was) observed that, in the absence of a written constitution, constitutional rights were based in the common law and were 'logically prior' to the democratic (political) process. Many of the liberal democratic values embedded in the common law are now codified in Bills of Rights and other domestic and international human rights instruments. Their codification represents a distillation of ethical values but it does not re-establish the rights as statutory creations by gift of Parliament. The liberty of the person and freedoms of expression, movement and association are common law creations that have a long and illustrious history, pre-dating even Magna Carta and the English Parliament. The constitutional content of common law rights will continue to evolve through the independent functioning of the courts across the entire spectrum of adjudication. The law of judicial review developed through common law method and will naturally assimilate domestic and international human rights developments.

## VIII. CONCLUSION

The writer's article, 'The Demise of Ultra Vires', canvassed the history of judicial review and the attempt to promote ultra vires as the foundation of judicial review. It concluded that the ultra vires doctrine is 'formalist in method, is profoundly ahistorical, and fails in its claim to provide a workable theory of judicial review'.<sup>108</sup> 'Try as it may, the modified doctrine remains fictional and contrived'.<sup>109</sup> The mantra of popular democracy cannot cloak the deeply imbued, common law foundations of judicial review. From their inception, the courts have developed the law in the pursuit of just and workable solutions and have intervened to protect the citizenry from executive interference. No theory founded on fiction and formalism can explicate these fundamental constitutional roles.

<sup>103</sup> *R v Secretary for the Home Department: Ex p Simms* [2000] 2 AC 115, 131.

<sup>104</sup> Lord Steyn, 'Democracy Through Law', above n 38, 13.

<sup>105</sup> *R v Secretary of State for the Home Department; Ex p Pierson* [1998] AC 539, 589.

<sup>106</sup> Above n 38, 20.

<sup>107</sup> [1998] QB 575, 586.

<sup>108</sup> Joseph, 'The Demise of Ultra Vires', above n 2, 376.

<sup>109</sup> *Ibid.*



The last word is for Lord Steyn who delivered the inaugural Robin Cooke Lecture, 'Democracy Through Law'.<sup>110</sup> He explored the twin strains of the democratic ideal - the principle of majority rule and an independent and impartial judiciary. He concluded: 'By overwhelming weight of reasoned argument the ultra vires theory has shown to be a dispensable fiction'.<sup>111</sup> Lord Steyn enshrined these words by renouncing his earlier observations in *Boddington v British Transport Police*.<sup>112</sup> There, with the agreement of the other Law Lords, he affirmed the orthodoxy that the ultra vires doctrine legitimised judicial review. Ultra vires protagonists placed great store in *Boddington*, as ending all speculation about the conceptual foundations of judicial review. Forsyth and Whittle expressed indignation that the writer should suggest (in their words) that: 'Lord Steyn may, notwithstanding the line he took in *Boddington*, favour the rule of law'.<sup>113</sup> 'This', they ventured, 'can hardly be considered the demise of ultra vires in the United Kingdom'.<sup>114</sup> The writer had (notwithstanding *Boddington*) canvassed Lord Steyn's dicta as a ringing affirmation of the common law foundations of judicial review.<sup>115</sup> In the House of Lords decisions *Ex p Pierson*<sup>116</sup> and *Exp Simms*,<sup>117</sup> his words lifted from the page like beacons, illuminating the role of the rule of law and common law method in judicial review. My raising of the authorial eyebrow was vindicated when, in 'Democracy Through Law', Lord Steyn renounced his views in *Boddington*. He commended the New Zealand Court of Appeal decision in *Peters v Davison*<sup>118</sup> (which explicitly adopted a rule of law rationale for judicial review) and concluded:

In a democracy the rule of law itself legitimises judicial review. I now accept that the traditional justification in England of judicial review is no longer supportable.<sup>119</sup>

Lord Steyn's pursuit of the principle of constitutionalism cut through the incantation that deifies democracy and discounts judicial power. He encapsulated the vitality of the common law, as a force that will strengthen and promote (what he termed) the 'constitutionalisation' of our public law.<sup>120</sup> The ultra vires doctrine is a pesky distraction that has no relevance to the legal world he sketched. That world has already moved on, ironically (some may say) by reclaiming the courts' common law past.

<sup>110</sup> Above n 38.

<sup>111</sup> Ibid 6 (citing Joseph, 'The Demise of Ultra Vires', above n 2; Jowell, 'Beyond the Rule of Law: Towards Constitutional Review', above n 3).

<sup>112</sup> [1999] 2 AC 143 (HL).

<sup>113</sup> Forsyth and Whittle, above n 1, 461.

<sup>114</sup> Ibid.

<sup>115</sup> Joseph, 'The Demise of Ultra Vires', above n 2, 362-3.

<sup>116</sup> [1998] AC 539.

<sup>117</sup> [2000] 2 AC 115.

<sup>118</sup> [1999] 2 NZLR 164, 192 (quoting the Court of Appeal with approval).

<sup>119</sup> Steyn, above n 38, 5-6.

<sup>120</sup> Ibid 27.